No. 89-18

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

ROBERT D. GILMER,
Petitioner,
v.
INTERSTATE/JOHNSON LANE CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF AMICI CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE PROFESSIONAL EMPLOYMENT RESEARCH COUNCIL IN SUPPORT OF RESPONDENT

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The Equal Employment Advisory Council ("EEAC") and the Professional Employment Research Council ("PERC") respectfully submit this brief *amici curiae*. The written consents of all parties have been filed with the Clerk of this Court. The brief urges affirmance of the decision below and thus supports the position of Respondent before this Court.

INTEREST OF THE AMICI CURIAE

EEAC is a nationwide association of employers and trade associations organized in 1976 to promote sound approaches to the elimination of discriminatory employ-

ment practices. Its membership comprises a broad segment of the business community. The Council's governing body is a Board of Directors composed of experts in the field of equal employment opportunity. Their combined experience gives the Council an unmatched depth of knowledge of the practical as well as the legal aspects of equal employment policies and requirements. The members of EEAC are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members, and the constituents of its trade association members, are employers subject to the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (ADEA), and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (Title VII), as well as other equal employment statutes and regulations. As employers, many of EEAC's members and member constituents have entered into contracts governing some or all terms and conditions of employment. Some of these agreements are entered into with individual employees, while others are reached with employee organizations through the collective bargaining process. Many such contracts include agreements to arbitrate. As potential respondents to charges of discrimination pursuant to the ADEA and other employment statutes, EEAC's members are interested in the extent to which a contractual commitment to arbitrate disputes arising out of the employment relationship is enforceable when the claim arises under the ADEA.

PERC is an organization composed of participants in the personnel placement service industry. Its membership includes franchisors, referral networks, companies, and the largest national association in the industry. In all, approximately 4,000 offices are represented in PERC, a number which approaches twenty-five percent of the entire industry. The vast majority of the offices represented are small businesses with five to ten employees.

Many of PERC's members and member constituents have employment agreements which utilize arbitration

agreements. This affords them the ability to resolve disputes in a manner that is more expeditious and less expensive and time-consuming than litigation. Since the owners are needed in the day-to-day management of their businesses and often are dependent on their own personal productivity, the time involved in even unfounded litigation could have a disastrous effect on their businesses.

Thus, the issues presented in this appeal are extremely important to the nationwide constituencies that EEAC and PERC represent. The court below held that the agreement between Petitioner and Respondent to arbitrate all claims arising out of their employee-employer relationship compelled arbitration of Petitioner's claim under the ADEA. This conclusion is consistent with this Court's more recent decisions regarding arbitration, and is not inconsistent with the language, the legislative history, or the purposes of the ADEA.

Because of its interest in the orderly application of the nation's civil rights laws, EEAC has filed briefs as amicus curiae in cases before the United States Supreme Court, the United States Circuit Courts of Appeals and various state supreme courts. As part of this amicus activity, EEAC has briefed a number of cases involving the interface between arbitration or grievance procedures and statutory claims. *See McDonald v. City of West Branch, Michigan*, 466 U.S. 284 (1984) (unappealed arbitration award does not have preclusive effect in case brought under 42 U.S.C. § 1983); *IUE, Local 790 v. Robbins & Meyers*, 429 U.S. 229 (1976) (filing a contractual grievance does not toll Title VII charge-filing period); *Becton v. Consolidated Freightways*, 687 F.2d 140 (6th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983) (arbitration decision that employee was discharged for just cause can be relied upon in a Title VII suit to show a valid reason for discharge); *Strozier v. General Motors*, 635 F.2d 424 (5th Cir. 1981) (knowing and voluntary acceptance of reinstatement and back pay under a grievance settlement constituted a waiver of the

right to file a later Title VII suit based upon the same facts).[1]

EEAC and PERC seek to assist the Court in this case by highlighting the impact its decision may have beyond the instant case in the field of employment dispute resolution generally. Accordingly, this brief brings relevant matter to the attention of this Court that has not already been brought to its attention by the parties. Because of their substantial experience, EEAC and PERC are uniquely situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Respondent Interstate/Johnson Lane Corporation ("Interstate") hired Petitioner Robert D. Gilmer as a manager of financial services in May 1981. As a condition of his employment, Gilmer filed an application for securities registration with the New York Stock Exchange. The application contained an arbitration clause in which he agreed to arbitration of any employment dispute, including termination. Gilmer's employment was terminated in November 1987, and in August 1988 he filed an ADEA suit against Interstate in the United States District Court for the Western District of North Carolina. Pet. App. 3a-4a.[2]

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[1] Furthermore, EEAC has participated in several cases in this Court involving proper interpretation of the ADEA, including *Public Employees Retirement System v. Betts*, 109 S.Ct. 2854 (1989); *Harbison-Walker Refractories v. Brieck, cert. dismissed*, 487 U.S. 1216 (1988); *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985); *Lorillard v. Pons*, 434 U.S. 575 (1978); *Shell Oil Co. v. Dartt*, 434 U.S. 99 (1977). *See also McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988) (standard for willful violations under the FLSA, Equal Pay Act and ADEA).

[2] The decision below, *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195 (4th Cir. 1990), from which the foregoing factual summary was drawn, is reproduced at Appendix to Petition for Certiorari ("Pet. App.") at 1a-36a. Citations to the Brief on the Merits for Petitioner are designated "Br. Pet."

Interstate filed a motion to compel arbitration pursuant to the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.* The district court denied the motion, and Interstate appealed. The Fourth Circuit reversed, concluding that enforcement of the arbitration agreement was appropriate under the FAA. Using the analysis outlined by this Court in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987), the Fourth Circuit found no indication of congressional intent to preclude arbitration in the ADEA's language, legislative history or underlying purposes. Pet. App. 3a.

SUMMARY OF ARGUMENT

The Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, mandates enforcement of agreements to arbitrate disputes, even when statutory claims are involved. In recent decisions, this Court has expressed increasing confidence in the arbitral process as a means of resolving claims, rejecting the traditional judicial attitude of hostility towards arbitration. The Court already has overruled one decision refusing to arbitrate a statutory claim on this basis.

In contrast, three older decisions involving arbitration clauses in collective bargaining agreements sharply criticize arbitration as a means of resolving statutory claims arising out of employment disputes, holding that arbitration under such circumstances should not be afforded preclusive effect. Because of this Court's changing view towards arbitration, and because those older cases involved collective bargaining agreements rather than individual agreements to arbitrate, those three decisions should not be applied to the instant case.

As this Court has explained, an arbitration agreement should be enforced as to statutory claims unless Congress

has shown that it intended to preclude waiver of a judicial forum. This intent can be shown in any of three ways—through clear statutory language, legislative history, or an inherent conflict between arbitration and the purposes of the statute.

No such intent is shown in the Age Discrimination in Employment Act. The statutory language and legislative history are utterly devoid of any mention of arbitration. Moreover, the purposes of the Act do not conflict with dispute resolution by arbitration. Individual statutory rights are safeguarded, and the role of the Equal Employment Opportunity Commission remains unchanged.

In addition, sound public policy supports the enforcement of agreements to arbitrate. The increasing number of employment disputes that result in federal lawsuits, with the resultant overcrowding of the federal dockets, has prompted the Federal Courts Study Committee to propose arbitration as a solution. Arbitration offers a faster, less expensive approach to dispute resolution without sacrificing the rights of individuals that the ADEA was intended to protect. When an employee and employer have agreed to arbitrate their differences, such agreements are enforceable under the Federal Arbitration Act.

ARGUMENT

I. THE FEDERAL ARBITRATION ACT, BOLSTERED BY THIS COURT'S INCREASING CONFIDENCE IN THE ARBITRAL PROCESS, MANDATES ENFORCEMENT OF A PRIVATE AGREEMENT TO ARBITRATE EMPLOYMENT DISPUTES

The case before this Court seeks enforcement under the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-15, of an individual agreement to arbitrate employment disputes. As the court below correctly recognized, this Court's earlier decisions in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), *Barrentine v. Arkansas-Best Freight Systems*, 450 U.S. 728 (1981), and *McDonald v. City of West Branch, Michigan*, 466 U.S. 284 (1984), are inapplicable to this case for two important reasons. First, those cases predate this Court's series of decisions strongly endorsing enforcement of private agreements to arbitrate, and criticize the arbitral process on grounds later repudiated by this Court. Second, *Gardner-Denver*, *Barrentine* and *McDonald* all involved arbitration under collective bargaining agreements, and thus are not applicable to cases involving individual agreements to arbitrate.

A. Judicial Hostility to Arbitration as a Means for Resolving Statutory Claims Has Been Repudiated in This Court's Recent Decisions

1. Mitsubishi *(1985)*, McMahon *(1987) and* Rodriguez *(1989) Express Increasing Confidence in the Arbitral Process*

The FAA "was designed to overcome an anachronistic judicial hostility to agreements to arbitrate, which American courts had borrowed from English common law." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 625 n.14 (1985) (citations omitted).[3] The Act

[3] The key provision of the FAA is Section 2, which provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbi-

reflects a "liberal federal policy favoring arbitration agreements . . . guaranteeing the enforcement of private contractual arrangements . . . ." *Id.* at 625 (citations omitted). Indeed, "'[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered,' a concern which 'requires that [this Court] rigorously enforce agreements to arbitrate.'" *Id.* at 625-26.

This Court's 1985 *Mitsubishi* opinion is the first in this Court's uninterrupted series of decisions enforcing private agreements to arbitrate under the FAA even when statutory claims are involved.[4] *Mitsubishi* involved an arbitration agreement contained in an international commercial contract between an automobile manufacturer and a distributor. Finding no reason to diverge from the federal policy favoring arbitration merely because the claim was based on statutory rights, 473 U.S. 626, this Court ruled the agreement enforceable as to claims under the Sherman Act, 15 U.S.C. § 1 *et seq.*

Later, in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), the Court addressed yet another

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tration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

[4] A number of earlier decisions foreshadowed *Mitsubishi* and its progeny. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, 460 U.S. 1 (1983), this Court agreed with the court of appeals that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." 460 U.S. at 24. In *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985), the Court concluded that under the FAA, a motion to compel arbitration of otherwise arbitrable claims must be granted. 470 U.S. at 219.

demand for arbitration of statutory claims. There, the arbitration clause in question was contained in two agreements between securities customers and their broker. Emphasizing once again the federal policy favoring arbitration, the Court held that both a claim under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and one brought under the Racketeer Influenced and Corrupt Organizations Act (RICO) 18 U.S.C. § 1961 *et seq.*, must be arbitrated.

In *McMahon*, this Court cast substantial doubt on its earlier opinion in *Wilko v. Swan*, 346 U.S. 427 (1953), which had held that a judicial remedy for misrepresentation under Section 12(2) of the Securities Act of 1933 could not be waived by an arbitration agreement. As explained in *McMahon*, the Court ruled in *Wilko* that "the plaintiff's waiver of the 'right to select the judicial forum' . . . was unenforceable only because arbitration was judged inadequate to enforce the statutory rights created by § 12(2)." 482 U.S. at 228-29. The Court observed in *McMahon* that most of the reasons given in *Wilko*, which "reflect a general suspicion of the desirability of arbitration and the competence of arbitral tribunals," 482 U.S. at 231, subsequently had been rejected.

Most recently, in *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 109 S.Ct. 1917 (1989) this Court conclusively overruled *Wilko*. The decision noted that "[t]o the extent that *Wilko* rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." 109 S. Ct. at 1920. The Court ruled that an agreement to arbitrate claims under the Securities Act of 1933 was enforceable.

2. Gardner-Denver *(1974)*, Barrentine *(1981)* and McDonald *(1984)* Rest on an "Outmoded Presumption of Disfavoring Arbitration" and, in Any Event, Are Inapplicable to Cases Involving Individual Agreements To Arbitrate

In light of the strong federal policy favoring arbitration, as expressed by Congress in the FAA and by this Court in *Mitsubishi, McMahon and Rodriguez*, it is important that the earlier decisions of this Court regarding arbitrability of statutory claims in the employment context, all of which concerned arbitration under collective bargaining agreements rather than individual contracts, not be applied indiscriminately without considering the impact of this Court's continuously increasing confidence in the arbitral process.

In *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), this Court ruled that submission of a claim of employment discrimination to arbitration under the nondiscrimination clause of a collective bargaining agreement does not preclude the right to a trial *de novo* under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* In *Barrentine v. Arkansas-Best Freight Systems*, 450 U.S. 728 (1981), the Court concluded that employees could bring suit under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, even though they already had submitted their claims to a joint grievance committee under the collective bargaining agreement. Finally, in *McDonald v. City of West Branch, Michigan*, 466 U.S. 284 (1984), the Court refused to allow an arbitration award under a collective bargaining agreement to have preclusive effect in a civil rights lawsuit under 42 U.S.C. § 1983.

Petitioner argues strongly that those cases control the outcome here. Because they rest in substantial part on concerns about arbitration that predated this Court's more favorable view expressed in *Mitsubishi, McMahon* and *Rodriguez*, however, their applicability is highly suspect, particularly where they are used to contend that in no circumstances should arbitration be required at all.

In *McDonald*, the Court articulated the four reasons set forth in *Gardner-Denver* and *Barrentine* for holding labor arbitration inadequate to protect federally-created rights. 466 U.S. at 290-292. First, the Court expressed concern that the expertise of labor arbitrators was limited to "the law of the shop, not the law of the land," *Gardner-Denver*, 415 U.S. at 57, so that arbitrators would not be competent to interpret complex legal issues with a more public focus. Second, the Court observed that where the contract delimits the arbitrator's authority, the arbitrator may lack the authority to enforce the statute in question. Third, the Court noted that in the collective bargaining context, the union, not the employee, controls the case. Fourth, the Court criticized the arbitral fact-finding process as inferior to the judicial process.

The dubious viability of these harsh criticisms of the arbitration process, as well as the inapplicability of these factors to cases involving individual agreements, were analyzed in detail in Judge Becker's cogent dissent in *Nicholson v. CPC International Inc.*, 877 F.2d 221 (3d Cir. 1989) (Becker, J., dissenting). Judge Becker carefully considered the listed factors in light of this Court's more recent decisions taking a more favorable view of arbitration.

The first and fourth factors, that arbitrators lack the necessary expertise and that the arbitration procedure itself is inferior, were explicitly rebuffed by this Court in *McMahon* when it criticized the *Wilko* rationale. In particular, the Court explained that "[i]n *Mitsubishi*, for example, we recognized that arbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims, notwithstanding the absence of judicial instruction and supervision. . . . Likewise, we have concluded that the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights." 482 U.S. at 232.

In *Rodriguez*, this Court described "[t]he Court's characterization of the arbitration process in *Wilko* [as] pervaded by what Judge Jerome Frank called 'the old judicial hostility to arbitration.'" 109 S. Ct. at 1920. This appellation is no less applicable to the same characterization articulated in *Gardner-Denver*. Accordingly, having been rejected by this Court, the "outmoded presumption of disfavoring arbitration proceedings," *id*, should not be resurrected now. As this Court explained in *McMahon*, "'we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals' should inhibit enforcement of the [Federal Arbitration] Act 'in controversies based on statutes.'" *McMahon*, 482 U.S. at 226, *quoting Mitsubishi*, 473 U.S. at 627.

The second *Gardner-Denver* factor, that the arbitrator will enforce the contract, not the law, likewise was repudiated by this Court in *McMahon* as part of its critique of *Wilko*. This Court stated unequivocally that "there is no reason to assume at the outset that arbitrators will not follow the law; although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute." 482 U.S. at 232. Accordingly, as this Court stated in *Mitsubishi*, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." 473 U.S. at 628, *quoted in McMahon*, 482 U.S. at 229-30, and *Rodriguez*, 109 S. Ct. at 1920.

The fourth *Gardner-Denver* factor, that the arbitral forum is inadequate to enforce individual statutory rights because of union control of the process, is wholly inapplicable to the case at bar. *Gardner-Denver*, *Barrentine*, and *McDonald* all dealt with arbitration under collective bargaining agreements, and all three recognized the tension between the collective bargaining process, in

which rights are negotiated and arbitrated by unions on behalf of the group, and individual statutory guarantees of specific substantive rights. *See, e.g., Barrentine*, 450 U.S. at 734-35. Although *Gardner-Denver* expressed concern that the union may subjugate the rights of the individual to the rights of the group, this concern does not apply where, as here, the arbitration agreement was made with the individual employee and no union is involved.

Moreover, *Gardner-Denver*, *Barrentine*, and *McDonald* never discussed the applicability of the FAA—in all likelihood because of this Court's strong preference for using § 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185, rather than the FAA, to analyze collective bargaining agreements.[5] Thus, in those cases the Court did not have occasion to address the federal policy favoring arbitration established by the FAA.

Accordingly, to the extent that *Gardner-Denver*, *Barrentine* and *McDonald* reflect the type of judicial disfavor to arbitration that the Court has subsequently rejected, they should not be applied to the instant case. In addition, where that disfavor is rooted in a concern that the arbitration will be dominated by a union unwilling to champion individual rights, it is inapplicable to the individual arbitration agreement before the Court.[6]

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[5] *See, e.g., General Electric Company v. Local 205, United Electrical, Radio and Machine Workers of America (U.E.)*, 353 U.S. 547, 548 (1957).

[6] The argument has been made that this Court's opinion in *Atchison, Topeka and Santa Fe Railway Company v. Buell*, 480 U.S. 557 (1987), decided after *Mitsubishi*, somehow reaffirms the continuing applicability of *Gardner-Denver* and its progeny to individual statutory claims. *Buell*, however, is yet another collective bargaining case, and inapplicable solely on that basis.

B. The Recent EEOC Pronouncement Regarding Arbitration of ADEA Claims Is Not Entitled to Deference

The recent EEOC Policy Guidance regarding arbitration of ADEA claims, EEOC Notice No. N-915-060 (August 29, 1990) (hereinafter "EEOC Notice"), should not be accorded any weight by this Court. The EEOC Notice takes the position advocated by Petitioner in this case that *Gardner-Denver*, *Barrentine* and *McDonald* preclude enforcement of an agreement to arbitrate claims under the ADEA. The Commission notes that *Gardner-Denver* involved a collective bargaining agreement, but concludes that *Gardner-Denver* should not be limited to its facts. EEOC Notice at 3 n. 4.

Unlike contemporaneous and constant agency interpretations of statutory language, the EEOC Notice is entitled to no special deference. *Cf. Public Employees Retirement Systems of Ohio v. Betts*, 109 S. Ct. 2854, 2863 (1989) (noting that EEOC regulation for which deference was claimed was not, in fact, adopted contemporaneously with the ADEA's enactment but took its present form more than ten years later). Here, the agency interpretation occurred a full twenty-three years after the ADEA was passed, and conveniently was prepared in time for this Court's consideration of the case. It, therefore, deserves no special deference from this Court.

C. The Federal Arbitration Act Is Applicable to Individual Employment Agreements

The three *amici curiae* filing briefs in support of Petitioner have argued that the Federal Arbitration Act is inapplicable to individual agreements to aribtrate. To the extent that such arguments may be relevant to the instant case,[7] they are incorrect, according to numerous consistent interpretations by the courts of appeals.

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[7] As noted in *Respondent's Motion To Strike Portions Of Briefs Of Amici Curiae Filed In Support Of Petitioner*, this issue was not raised by Petitioner below, nor was it presented to this Court, and thus should not be addressed by the Court.

Section 1 of the FAA, which defines "maritime transactions" and "commerce" for purposes of the FAA and outlines exceptions to the statute, states in pertinent part, ". . . nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. As explained in detail by the Third Circuit in *Tenney Engineering, Inc. v. United Electrical Radio & Machine Workers of America, (U.E.) Local 437*, 207 F.2d 450 (3d Cir. 1953), Congress' description of the types of workers excluded from FAA coverage is crucial. Under the statutory construction principle of *ejusdem generis*, the Third Circuit reasoned, specific identification of two groups of workers directly engaged in the transportation of goods in interstate commerce delimits the following phrase "or any other class of workers engaged in foreign or interstate commerce" to workers who are likewise occupied in the movement of goods in commerce. *Id.* at 452.[8]

Subsequent decisions of the courts of appeals have remained consistent with *Tenney*, adopting the Third Circuit's analysis and limitation of the FAA exclusion in cases involving both collective bargaining agreements and

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[8] Thus, this Court's footnote in *United Paperworkers International Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 40 n.9 (1987), is not incompatible with the *Tenney* holding. Applying the FAA standard of reviewability to a labor arbitration award, this Court noted, "The Arbitration Act does not apply to 'contracts of employment of . . . workers engaged in foreign or interstate commerce,' 9 U.S.C. § 1, but the federal courts have often looked to the Act for guidance in labor arbitration cases." The Court in *Misco* was not ruling on the scope of the FAA exclusion. Moreover, under *Tenney*, it can fairly be said that collective bargaining agreements in the transportation industry, which encompasses a large number of such agreements, *are* excluded from the FAA.

individual agreements to arbitrate.[9] Indeed, using the *Tenney* analysis, courts have refused to apply the Section 1 exclusion to individual agreements to arbitrate executed by employees who, as here, work in the securities industry, on the grounds that they are not involved in the transportation of goods in interstate commerce. *See Dickstein v. DuPont*, 443 F.2d 783, 785 (1st Cir. 1971). *See also Stokes v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 523 F. 2d 433, 436 (6th Cir. 1975) (plaintiff account executives "do not seriously contend that . . . they fall within the exception . . . ."). This Court itself has applied the FAA to arbitration agreements contained in an individual contract of employment substantially similar to the one Gilmer signed. *Perry v. Thomas*, 482 U.S. 483 (1987) (State statute permitting lawsuits for collection of wages regardless of the existence of an arbitration agreement is pre-empted by the FAA).

Given the clarity of the statutory language, there is no need to probe the legislative history to try to create a contrary result. *United Air Lines v. McMann*, 434 U.S. 192, 198-99 (1977) ("[L]egislative history . . . is irrelevant to an unambiguous statute."). Accordingly, the lengthy discussions of the FAA legislative history offered by Gilmer's *amici* can be disregarded.

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[9] *See, e.g., Miller Brewing Company v. Brewery Workers Local Union No. 9, AFL-CIO*, 739 F.2d 1159 (7th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985) (Section 1 exclusion "limited to workers employed in the transportation industries"); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064 (2d Cir. 1972) (professional basketball player not involved in the transportation industry and thus not excluded from FAA); *Signal-Stat Corporation v. Local 475, United Electrical, Radio and Machine Workers of America (UE)*, 235 F.2d 298 (2d Cir. 1956) (manufacturing workers not engaged in commerce, so that collective bargaining agreement not excluded by Section 1); *Hydrick v. Management Recruiters International, Inc.*, 738 F. Supp. 1434 (N.D. Ga. 1990) (stating "Indeed, if Congress had intended to exclude all employment contracts from the Act, it would have been unnecessary to identify specific categories of workers." *Id.* at 1435).

II. VOLUNTARY ARBITRATION OF ADEA CLAIMS IS NOT INCONSISTENT WITH THE PURPOSES OF THE ACT AND IS SUPPORTED BY SOUND PUBLIC POLICY

A. The FAA Requires Arbitration of Statutory Claims Unless Congress Intended Otherwise

The FAA, "standing alone, . . . mandates enforcement of agreements to arbitrate statutory claims," and only a contrary statement from Congress will override the FAA. *McMahon*, 482 U.S. at 226. In *McMahon*, this Court clarified the framework for evaluating the enforceability of agreements to arbitrate statutory claims. The groundwork for this analysis was laid in *Mitsubishi*, where the Court stated, "We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history." 473 U.S. at 628. In *McMahon*, the Court restated that Congressional intent to override the FAA must be ascertainable from the statutory language or legislative history, "or from an inherent conflict between arbitration and the statute's underlying purposes." *McMahon*, 482 U.S. at 227 (citations omitted). The burden of demonstrating such Congressional intent is on the party who opposes arbitration. *Id.*

B. The ADEA Does Not Preclude Voluntary Arbitration

The court below correctly concluded that Congress revealed no such intent in the Age Discrimination in Employmet Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.* Pet. App. 7a. As the Fourth Circuit noted, even the Third Circuit, which reached a result contrary to the decision below in *Nicholson v. CPC International, Inc.*, 877 F.2d 221 (3d Cir. 1989), had to admit that neither the ADEA's statutory language nor its legislative history

mentioned arbitration, so that it was "forced to 'draw inferences from Congress' actions.'" Pet. App. 8a, *quoting Nicholson*, 877 F.2d at 197. Accordingly, under the *McMahon* analysis, the ADEA can be held to prohibit waiver of a judicial forum only if arbitration conflicts with the purposes of the statute.

The stated purposes of the ADEA are "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b). As the court below accurately determined, there is no "inherent conflict between arbitration and the [ADEA's] underlying purposes" that would signal Congressional intent to preclude waiver of a judicial forum for ADEA claims. Pet. App. 7a.

1. *Arbitration Can Protect Individual Rights*

To the extent that vindication of individual rights is a purpose of the ADEA, this Court's recent decisions reveal that arbitration offers no less valuable a remedy than the judicial process outlined in the statute. As noted above, this Court repeatedly has pointed out that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." 473 U.S. at 628, *quoted in McMahon*, 482 U.S. at 229-30, and *Rodriguez*, 109 S. Ct. at 1920. These substantive rights are well preserved by the arbitration process. One court explained the procedural safeguards available when ADEA claims are arbitrated as follows:

> The commercial arbitration procedures are substantially similar to those in a judicial forum, . . . and the arbitrator has sufficient power to structure a remedy to eliminate age discrimination. . . . An arbitration decision under the Federal Arbitration Act is explicitly subject to review in certain circumstances. . . . In addition, arbitral awards may be overturned if in manifest disregard of the law.

Pierce v. Shearson Lehman Hutton, 52 Fair Emp. Prac. Cases (BNA) 1882, 1884, *appeal dismissed for lack of jurisdiction*, No. 90-2079 (7th Cir. September 24, 1990) (stayed by district court pending outcome of *Gilmer*) (citations omitted). *See also McMahon*, 482 U.S. at 231-32 (confirming sufficiency of arbitration procedures and remedies). Even *Gardner-Denver*, while requiring a trial *de novo* after arbitration under a collective bargaining agreement, acknowledged that an arbitration decision could "give[] full consideration to an employee's Title VII rights," and that such a decision should be given "great weight" by the court. *Gardner-Denver*, 415 U.S. at 60 n.21.

It is true that the ADEA incorporates by reference the enforcement provisions of the Fair Labor Standards Act (FLSA). 29 U.S.C. § 626(b).[10] It is also true that this Court's decision in *Barrentine* held that employees could bring suit under the FLSA, 29 U.S.C. § 201 *et seq.*, even though they already had submitted their claims to a joint grievance committee under the collective bargaining agreement. *Barrentine*, however, does not control the outcome of this case.

First, it is clear that Congress incorporated the FLSA enforcement scheme into the ADEA not because it preferred a judicial remedy, but merely "for reasons of expediency," relegating ADEA charges to the Department of Labor Wage and House Division rather than the then-overworked Equal Employment Opportunity Commission (EEOC).[11] Moreover, while the FLSA provisions incor-

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[10] These provisions include recordkeeping requirements, available remedies, including the statutory cause of action, and the statute of limitations. 29 U.S.C. §§ 211, 216 and 217.

[11] Note, *A Test of Arbitrability: Does Arbitration Provide Adequate Protection for Aged Employees?* 35 Villanova L. Rev. 389, 422 and n.171 (1990).

porated into the ADEA provide a judicial remedy, two other ADEA sections require the EEOC to attempt to resolve the parties' differences through conciliation, conference and persuasion—when a charge is filed, 29 U.S.C. § 626(d)(2), and before the EEOC can file its own lawsuit. 29 U.S.C. § 626(b). Accordingly, the statute gives substantial credence to efforts to resolve claims without litigation, a form of "voluntary dispute resolution." Finally, as noted earlier, *Barrentine* involves arbitration under a collective bargaining agreement, rather than an individual agreement to arbitrate as presented here.

2. *Arbitration Does Not Interfere with the EEOC's Enforcement Role*

Petitioner also argues that permitting employees to choose compulsory arbitration will undermine the EEOC's role in the statutory scheme to eliminate discrimination in employment. (Br. Pet. 15). This argument mischaracterizes the part the EEOC plays in the process.

The EEOC does not, and could not, handle all potential ADEA claims. First, employees are permitted to waive entire ADEA claims without EEOC involvement.[12] Indeed, Congress recently amended the ADEA to clarify the standards by which a waiver will be considered "knowing and voluntary" and therefore valid. Older Workers' Benefit Protection Act, Pub. L. 101-433 (1990). While early drafts of the bill would have required EEOC supervision of such waivers, the final bill does not.[13] Just as nothing prohibits an employee from voluntarily waiving ADEA rights *in toto* or from resolving an ADEA dispute without EEOC participation, nothing in the ADEA prevents an employee from electing an arbitral rather than a judicial forum to resolve disputes. Indeed, as one federal judge has stated in a related context, "There is no suggestion in the statute or the circumstances leading to its enactment that when Congress gave ERISA plaintiffs 'ready access' to the federal courts, it was issuing an invitation to plaintiffs that they could not refuse." *Bird v. Shearson Lehman/American Express, Inc.*, 871 F.2d 292, 299 (2d Cir.) (Cardamone, J., dissenting), *vacated and remanded*, 110 S. Ct. 225 (1989). The same holds true for the ADEA.

Moreover, an employee's election of arbitration as the forum for resolving an individual dispute does not preclude the EEOC from becoming involved in the case. As Judge Becker explained in detail in his dissent in *Nicholson*, an agreement to arbitrate cannot bar the EEOC from pursuing an investigation and seeking appropriate remedies. *Nicholson*, 877 F.2d at 238 and n.8 (Becker, J. dissenting). Indeed, the FAA by its terms applies only to lawsuits, not administrative proceedings, so that an individual would not be precluded from filing a charge. 9 U.S.C. § 3. Further, the arbitration agreement is binding only upon the parties to that agreement, not on third parties such as the EEOC.

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[12] *Bormann v. AT & T Communications, Inc.*, 875 F.2d 399, 402 (2d Cir.), *cert. denied*, 110 S. Ct. 292 (1989); *Cirillo v. Arco Chemical Company*, 862 F.2d 448, 451 n.1 (3d Cir. 1988); *O'Hare v. Global Natural Resources, Inc.*, 898 F.2d 1015, 1016 (5th Cir. 1990); *Runyan v. National Cash Register Corp.*, 787 F.2d 1039 (6th Cir.), *cert. denied*, 479 U.S. 850 (1986); *Lancaster v. Buerkle Buick Honda Co.*, 809 F.2d 539, 540 (8th Cir.), *cert. denied*, 482 U.S. 928 (1987). *See also Dorosiewicz v. Keyser-Roth Hosiery, Inc.*, No. 86-3163 (4th Cir. June 24, 1987) (unpublished). *But see Gormin v. Brown-Forman Corp.*, 744 F. Supp. 1100 (M.D. Fla. 1990), *appeal docketed*, No. 90-3719 (11th Cir. August 8, 1990).

[13] *Compare* S. 2856, 100th Cong., 2d Sess., 134 Cong. Rec. S14509 (daily ed. October 4, 1988), H.R. 5500, 100th Cong., 2d Sess., 134 Cong. Rec. H10154 (daily ed. October 12, 1988), and S. 54, 101st Cong., 1st Sess., 135 Cong. Rec. S168 (daily ed. January 25, 1989) (all requiring EEOC supervision for a waiver to be valid).

3. *"Legislative History" of Unenacted Legislation Is Not Germane to this Case and Cannot Evince Congressional Intent*

Petitioner cites language from the Conference Report on the vetoed Civil Rights Act of 1990 as "evidence" of congressional intent that ADEA claims not be subject to arbitration. The quoted language opines that arbitration agreements which encompass Title VII claims, whether in a collective bargaining agreement or private contract, do not preclude resort to the Title VII enforcement provisions. Br. Pet. 14, citing Conf. Rep. No. 856, 101st Cong., 2d Sess 26 (1990). The reference does not strengthen Petitioner's position for several reasons. The referenced legislation has not become law,[14] and thus is not considered as part of the congressional intent relevant to statutory construction of the ADEA.

Moreover, the quoted language does not reference the ADEA, even though other portions of the legislation sought to amend the ADEA by changing the timely filing requirements for charges and individual lawsuits. Conf. Rep. No. 856, 101st Cong., 2d Sess. 12. Thus, the ADEA logically could have been mentioned in the conference discussion of arbitration had the Conference Committee intended also to include the ADEA.[15] Accordingly, while the Conference Committee easily could have included the ADEA in its discussion of arbitration, it apparently chose not to do so. In short, this bit of history is irrelevant in the instant case, where the statute in question is the Age Discrimination in Employment Act, not Title VII.

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[14] President Bush vetoed the bill, which would have made extensive amendments to Title VII, on October 22, 1990. Veto Message on S. 2104—Message from the President—PM 152. 136 Cong. Rec. S16457 (October 22, 1990).

[15] In addition, as discussed extensively above, the quoted statement goes substantially beyond *Gardner-Denver*, *Barrentine* and *McDonald*, which dealt solely with arbitration clauses in collective bargaining agreements, and thus cannot be considered as merely an endorsement of current law.

In any event, comments by members of Congress subsequent to the ADEA's enactment in 1967 are not relevant to establish the intent of the Congress that passed the ADEA. "The retroactive wisdom provided by the subsequent speech of a member of Congress stating that yesterday we meant something that we did not say is an ephemeral guide to history . . . . What happened after a statute was enacted may be history, and it may come from members of Congress, but it is not part of the legislative history of the original enactment." *Rogers v. Frito-Lay, Inc.* and *Moon v. Roadway Express, Inc.*, 611 F.2d 1074, 1080 (5th Cir.), *cert. denied*, 449 U.S. 889 (1980). Clearly, the legislative history of the ADEA is that which occurred prior to its enactment, and it is the ADEA that forms the basis for the instant action. Thus, pronouncements concerning measures that have not been enacted as amendments to the ADEA, and particularly those that have not become law at all, are of little value in interpreting the ADEA, which was passed over twenty years ago.

Indeed, this Court already has rejected comments regarding unenacted amendments to the ADEA itself as indicative of congressional intent. In *United Air Lines v. McMann*, 434 U.S. 192 (1977), holding that the ADEA as it then existed did not prohibit mandatory retirement pursuant to a bona fide plan established prior to the Act, the majority expressly rejected the contention that committee reports on pending legislation to amend the ADEA to prohibit mandatory retirement could be used to determine congressional intent concerning the ADEA, stating, "Legislative observations 10 years after passage of the Act are in no sense part of the legislative history." 434 U.S. at 200, n.7. *See also Bormann v. AT & T Communications, Inc.*, 875 F. 2d at 402 ("the introduction of these [ADEA waiver] bills . . . are not an authoritative interpretation of what the ADEA meant when the statute was enacted in 1967."). *See also Pierce v. Under-*

wood, 487 U.S. 552, 567-68, (1988) (subsequent Committee Report language contrary to settled law not controlling on the Court).

4. *Sound Public Policy Supports Arbitration of Employment Disputes*

Voluntary binding arbitration of employment disputes is consistent with the developing theory supporting arbitration as a method for relief of the serious overcrowding of the federal courts. The Federal Courts Study Committee, which seeks to offer solutions to the problems of the federal judiciary, has observed that the number of employment discrimination cases filed in the federal courts has increased by over two thousand percent since 1969. Report of the Federal Courts Study Committee at 61 (April 2, 1990). Recognizing this extraordinary growth to be an important factor in the current overcrowding in the courts, the Committee recommended that the EEOC be authorized to conduct voluntary binding arbitration of Title VII cases. *Id.* at 60-61. The Committee's position underscores the need to reduce, not increase, the number of court proceedings in employment discrimination cases. The Committee reasoned:

> One measure to assist these workers may lie outside the federal judiciary: voluntary arbitration by the EEOC. Arbitration would benefit those employers and employees who would prefer to try to settle their dispute before the agency rather than—or before trying—federal court litigation. And it might provide some caseload relief to the federal courts.

Id. at 61.

"Congress passed the Federal Arbitration Act . . . to help legitimate arbitration and make it more readily useful to disputants. The hope has long been that the Act could serve as therapy for the ailment of the crowded docket." *Securities Industry Association v. Connolly*, 883 F.2d 1114, 1116 (1st Cir. 1989), *cert. denied*, 110 S.Ct.

2559 (1990). Arbitration provides an extrajudicial means by which disputes that typically arise in an employment setting, such as whether there existed proper cause for discharge, can be resolved in a more efficient and less expensive manner without further burdening our overcrowded court system. Given the increasing number of civil cases that are filed in federal district courts, it is essential that alternative methods of resolving disputes short of litigation be explored and encouraged. In cases such as this, where an employee and employer have voluntarily agreed to submit their differences to a neutral arbitrator for resolution under a procedure that offers full and pair protection of substantive rights in a less costly and cumbersome forum than the court system, such an agreement should be encouraged, and indeed, must be enforced under the Federal Arbitration Act. In this manner, the Court can foster the preservation of scarce judicial resources without sacrificing the rights of individuals that the ADEA was designed to protect.

CONCLUSION

For the foregoing reasons, EEAC respectfully submits that the decision of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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